UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

AT&T MOBILILTY, LLC

And Case 5-CA-178637

MARCUS DAVIS, AN INDIVIDUAL

COUNSEL FOR THE GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION TO TRANSFER AND CONSOLIDATE CHARGES OR, IN THE ALTERNATIVE, MOTION TO POSTPONE HEARING

Based on a charge filed by Marcus Davis, an Individual, the Regional Director for Region Five of the National Labor Relations Board (the Regional Director) issued a Complaint and Notice of Hearing (the Complaint) on October 14, 2016 in the above-captioned case setting the hearing for December 7, 2016. On October 28, 2016, the Regional Director issued an Order Rescheduling Hearing setting the hearing for December 13, 2016. On November 21, 2016, Respondent AT&T Mobility (Respondent) filed a motion requesting that the Division of Judges transfer and consolidate the above-captioned case with Case 7-CA-182505. In the alternative, Respondent's motion requests that the Division of Judges postpone the scheduled hearing in Case 5-CA-178637 pending a resolution of Case 7-CA-182505.[1]

[1] In order to avoid any delay, the counsel for the General Counsel opposes postponing Case 5-CA-178637 until case 7-CA-182505 is resolved. That said, the counsel for the General Counsel does not oppose a reasonable postponement of this hearing. Based on the parties' December 1, 2016 email communications with the Division of Judges, the parties mutually agreed that the hearing should be rescheduled, upon approval by the Division of Judges, for February 10, 2017. On December 2, 2016, the Regional Director issued an Order rescheduling the hearing in this matter to February 10, 2017 in Washington, D.C.

In the above-captioned case, the Complaint alleges that Respondent maintains a Privacy of Communications rule that violates Section 8(a)(1). The Complaint also alleges that Respondent's Area Retail Sales Manager, Andrew Collins, violated Section 8(a)(1) when he threatened employees at Respondent's facility in Washington, D.C. with discharge if they violated the rule. In its Answer, Respondent, *inter alia*, admits maintaining the allegedly unlawful rule, denies the allegedly unlawful threat, and denies violating Section 8(a)(1). Respondent also raises several affirmative defenses, including that the allegedly unlawful rule is lawful under *Flagstaff Medical Center*, 357 NLRB 659 (2011).

Based on a charge filed by Local 4034, Communications Workers of America (CWA), AFL-CIO, the Regional Director for Region Seven alleges in Case 7-CA-182505 that the alleged joint employers Michigan Bell Telephone Company and AT&T Services, Inc. maintain an identical Privacy of Communications rule, in violation of Section 8(a)(1). The Complaint in Case 7-CA-182505 also alleges that the alleged joint employer maintains another rule, in violation of Section 8(a)(1), and suspended and discharged an employee on March 9 and 30, 2016, respectively, because the employee assisted and supported Local 4034, Communications Workers of America (CWA), AFL-CIO, in violation of Sections 8(a)(3) and (1). The hearing in Case 7-CA-182505 is currently scheduled for March 22, 2017 in Detroit, Michigan. Although the joint employer respondents have not yet filed an Answer, Respondent's motion suggests the joint employer respondents in Case 7-CA-182505 has (or will) assert the same affirmative defense of *Flagstaff Medical Center*, 357 NLRB 659 (2011). (*See* Mot. at 2, 4.)

Respondent's motion contends that the Division of Judges should transfer and consolidate Case 5-CA-178637 with Case 7-CA-182505. (Mot. at 2, 4.) According to Respondent, it is a separate and autonomous entity from the alleged joint employers in 7-CA-

182505. (*Id.* at 2, 4.) However, Respondent asserts that both are subject to an "enterprise-wide" Privacy of Communications rule. (*Id.* at 2, 4.) Thus, Respondent claims that the Board's Rules and Regulations permit the General Counsel to transfer and consolidate cases with any proceeding if the General Counsel determines transfer and consolidation are necessary "to effectuate the purposes of the Act and to avoid unnecessary costs or delay." (*Id.* at 3 (citing 29 C.F.R. § 102.33).) Further, Respondent's motion also claims that Section 11716 of the Casehandling Manual for Unfair Labor Practices and *Free-Flow Packing Corp.*, 219 NLRB 925 (1975), affd. 566 F.2d 1124, 1131 (9th Cir. 1978), support its conclusion that the Division of Judges should transfer and consolidate Case 5-CA-178637 and Case 7-CA-182505. (*Id.* at 3–4.)

Respondent's citations to the Board's Rules and Casehandling Manual are inapposite. It is Section 102.35(a)(8) of the Board's Rules that authorizes Administrative Law Judges to rule on motions to consolidate proceedings. *McDonald's USA, LLC*, 363 NLRB No. 91, *slip op.* at 1, 18 (2016). In determining whether to consolidate proceedings, judges consider the risk of relitigation and the likelihood of delay. *See Service Employees Local 87 (Cresleigh Management)*, 324 NLRB 774, 775–76 (1997). The Board has explained that relitigation concerns arise when: (1) the Board has made a determination whether certain conduct is unlawful under one section of the Act and the General Counsel files a new complaint alleging that such conduct violates a different section of the Act; or (2) the General Counsel raises a previously decided allegation in a new complaint. *See Detroit Newspapers*, 330 NLRB 524, 525–26 (2000) (citing *Service Employees Local 87 (Cresleigh Management)*, 324 NLRB at 775)).

Based on the representations in Respondent's motion, transfer and consolidation is not appropriate in this case. Respondent repeatedly stresses that Respondent and the charged parties

in Case 7-CA-182505 are autonomous and separate entities. (Mot. at 2, 4.) Yet Respondent's motion does not explain why the maintenance of a policy at two distinct entities justifies transfer and consolidation. In fact, the only case Respondent cites in its motion supporting consolidation involved only one employer. Instead, Respondent tries to thread the needle between its own autonomous entity and the joint-employer respondents in Case 7-CA-182505 by admitting that it is subject to the same "enterprise-wide" rule as the alleged joint employer respondents. (*Id.* at 2, 4.)

However, Respondent cannot have it both ways. Either Respondent and the alleged joint employers in Case 7-CA-182505 are distinct entities, or they are not. Given Respondent's representation that it is separate and autonomous from the respondents in Case 7-CA-182505, the Division of Judges should not conflate similar allegations and likely defenses for the danger of relitigation. Indeed, if the Division of Judges applied Respondent's rationale for consolidation—that these two cases should be consolidated despite involving distinct employers because they involve similar allegations and defenses—*any* two cases involving *any* two distinct entities enforcing similar rules would raise the prospect of relitigation. In view of Respondent's representation that it is autonomous and separate from the respondents in Case 7-CA-182505, counsel for the General Counsel respectfully requests that the Division of Judges conclude that any similarities do not raise relitigation concerns.

Yet even acknowledging the possibility that the distinct entities involved in Case 5-CA-178637 and Case 7-CA-182505 are "sufficiently related" and the identical rule involved in each case, the two cases involve highly-distinct and localized allegations that render the cases inappropriate for transfer and consolidation. Without delving into the details of the allegations in the separate complaints, Case 5-CA-178637 involves an additional allegation of a threat to

employees at a Washington, D.C. facility, whereas Case 7-CA-182505 involves not only an additional rule alleged to violate Section 8(a)(1), but a suspension and discharge of an employee, presumably in Michigan, because of his support for and activities on behalf of a union.

Likewise, consolidation with Case 7-CA-182505 will likely delay resolution of the allegations in Case 5-CA-178637. Considering the varying allegations detailed above, the hearing in Case 7-CA-182505 will likely require more detailed testimony and a more complicated record regarding the alleged joint employer's suspension and discharge of an employee for his union support and activities, consolidation will likely delay a decision on the merits of this case. Furthermore, unless the alleged joint employers admit to such status in Case 7-CA-182505, that case will also involve proving joint employer status. In contrast, Case 5-CA-178637 involves only the lawfulness of the rule, and whether Respondent threatened its employees with discharge if they violated the rule.

Finally, Respondent has not demonstrated that maintaining separate cases will result in unnecessary costs. Given the localized nature of the alleged threat in Case 5-CA-178637 to Respondent's employees at its Washington, D.C. facility, and Respondent's denial that such occurred, the undersigned has the burden of establishing, through testimonial evidence, that such a threat occurred. Presumably, Respondent's defense is that: (a) the General Counsel's evidence is not credible; (b) the event did not occur; or (c) the event occurred, but does not rise to the level of a threat violative of Section 8(a)(1). Regardless, the allegation potentially involves testimonial evidence from employees and supervisors from Respondent's Washington, D.C. facility. Thus, a consolidation of Case 5-CA-178637 with Case 7-CA-182505 would actually *increase* unnecessary costs, with the travel of individuals from the greater Washington, D.C. area to Detroit, Michigan. Rather than outright transfer and consolidation, the goals of efficiency and

consistency can be achieved through the cases being heard by the same Administrative Law Judge.

Given the separate entities involved, the likelihood of delay, and the lack of unnecessary costs associated with maintaining the cases as separate, consolidation is not appropriate. *See, e.g.*, *Railway Carmen Local 543 (North American Car Corp.)*, 248 NLRB 285, 285 fn. 2 (1980) (affirming administrative law judge's denial of a motion to consolidate an unfair labor practice case against a union with an unfair labor practice charge against an employer involving the same underlying facts and noting that Section 102.33 vests the authority to consolidate cases in the General Counsel.)

For all the reasons set forth above, counsel for the General Counsel respectfully requests that Respondent's Motion to Transfer and Consolidate Charges be denied.

Dated at Baltimore, Maryland, this 12th day of December 2016.

Respectfully Submitted,

/s/ *Paul J. Veneziano*
Paul J. Veneziano
Counsel for the General Counsel
National Labor Relations Board, Region 5
Bank of America Center, Tower II
100 South Charles Street, Suite 600
Baltimore, Maryland 21201
(410) 962-2740

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed this Counsel for the General Counsel's Opposition To Respondent's Motion To Transfer And Consolidate Charges Or, In The Alternative, Motion To Postpone Hearing on December 12, 2016, and, on that same day, copies were electronically served on the following individuals by electronic mail:

Stephen J. Sferra & Jeffrey A. Seidle, Esqs.
Littler Mendelson, PC
1100 Superior Avenue, 20th
Cleveland, OH 44114

Judith R. Kramer, Esq.
AT&T Services, Inc.
1 AT&T Way, Room 3A253
Bedminster, NJ 07921-2693

/s/ *Paul J. Veneziano*
Paul J. Veneziano
Counsel for the General Counsel
National Labor Relations Board, Region 5
Bank of America Center, Tower II
100 South Charles Street, Suite 600
Baltimore, Maryland 21201
(410) 962-2740